ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	WT Docket No. 96-6
To Permit Flexible Service Offerings	)	
in the Commercial Mobile Radio Services	)	

To: The Commission

COMMENTS OF WESTERN WIRELESS CORPORATION

Western Wireless Corporation ("WWC")[1] hereby submits its comments on the Commission's *Further Notice of Proposed Rule Making*, FCC 96-283 (Aug. 1, 1996) ("*FNPRM*"), *summarized*, 61 Fed. Reg. 43721 (Aug. 26, 1996) in the captioned proceeding. WWC supports the Commission's proposal to establish a rebuttable presumption that all services offered over spectrum assigned for commercial mobile radio services ("CMRS") are CMRS.[2] As stated below, however, WWC believes that this presumption should only be overcome by a showing that a carrier is offering fixed services that act as a replacement for landline service for a substantial portion of the public within a state.

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1 WWC, through its subsidiaries, holds numerous licenses to provide non-wireline cellular radiotelephone service ("cellular"), personal communications service ("PCS"), specialized mobile radio ("SMR") service, and paging and radiotelephone service ("paging") over a large portion of the western United States, including many rural areas. To complement its cellular presence in the western United States, WWC is now or soon will be providing PCS in the following major trading areas ("MTAs"): Denver, Des-Moines-Quad Cities, El Paso-Albuquerque, Honolulu, Oklahoma City, Portland, and Salt Lake City. As a CMRS operator providing cellular, PCS, and SMR wireless services to consumers in many rural areas, WWC is well-situated to provide fixed wireless service, including wireless local loop service, to consumers that otherwise would not be able to obtain wireline local loop service.

2 *FNPRM* at ¶ 53.

I. CONGRESS INTENDED PCS LOCAL LOOP APPLICATIONS TO BE REGULATED AS CMRS, REGARDLESS OF WHETHER THE APPLICATION IS FIXED OR MOBILE

In 1993, Congress amended the Communications Act of 1934 to remove state rate and entry jurisdiction over "mobile" wireless services that have the potential to develop into replacements for traditional land line local exchange services.[3] In this regard, Congress included a definition of the "mobile" services to which this policy would apply. The definition included not only traditional mobile services (*i.e.*, radio services between mobiles or between base stations and mobiles) but also "any service for which a license is required in a personal communications service" under the then-pending PCS rulemaking "or any successor proceeding." 47 U.S.C. § 153(27). Under the PCS definition proposed in the referenced rulemaking, a variety of fixed services provided by both cellular and PCS licensees would have been "personal communications services."[4] Thus, Congress expressly contemplated that fixed services provided by PCS and cellular licensees could fall within

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[3] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b) (1993) ("Budget Act"); H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 494 (1993).

[4] The FCC proposed the following definition of personal communications services shortly before Congress amended Section 332: "a family of mobile or portable radio communications services which could provide services to individuals and business, and be integrated with a variety of competing networks." *See Amendment of the Commission's Rules to Establish New Personal Communications Services*, GN Docket No. 90-314, *Notice of Proposed Rulemaking and Tentative Decision*, 7 F.C.C.R. 5676, 5689 (1992) ("*Tentative Decision*"). The Commission made clear, however, that fixed services could be offered pursuant to personal communications service licenses and proposed to amend its rules to permit cellular licensees to offer personal communications services over cellular spectrum. *Id.* at 5689, 5704. Ultimately, it adopted the proposed definition and stated that "[s]pecific kinds of PCS services and devices are expected to include advanced forms of cellular telephone service." *Amendment of the Commission's Rules to Establish New Personal Communications Services*, GN Docket No. 90-314, *Second Report and Order*, 8 F.C.C.R. 7700, 7712-13 (1992) ("*PCS Second Report*"). Moreover, cellular licensees were authorized to provide fixed personal communications services over cellular frequencies. *Id.* at 7747.

the definition of "mobile service."[5]

Congress not only defined "mobile" to include fixed services provided by PCS and cellular licensees, to the extent authorized by the Commission, it also recognized that these wireless "mobile" services have to potential to supplant traditional wireline telephone service. It expressly held that such wireless services would *not* be regulated in the same manner as wireline telephone service, unless a given service has effectively supplanted wireline service. Congress intended that:

> the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, *it is not the intention of the conferees that States should be permitted to regulate these competitive services* simply because they employ radio as a transmission means.[6]

Thus, Congress did not intend for states to regulate wireless basic telephone service, whether fixed or mobile, unless they served as a replacement for the traditional local exchange. The key issue for Congress was whether radio was employed. Nothing in the passage indicates that preemption was limited to traditional "mobile" radio services.

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[5] WWC takes issue with the suggestion that this definition could be interpreted to mean that "a service provided with a PCS license would have to include the use of a 'mobile station' to come within the definition of 'mobile service' and consequently be considered in the definition of 'commercial mobile service.'" *FNPRM* at ¶ 49. The definition specifically states "*any*" service provided pursuant to a personal communications service license — including Narrowband PCS, Broadband PCS, cellular, and paging services, as well as the fixed services provided by such licensees — is a mobile service. Thus, any application which offers some mobility, or even no mobility, will still be considered CMRS. If Congress had intended to limit the definition as suggested, it would have said "any mobile service" provided pursuant to a personal communications service license falls within the definition of a mobile service.

[6] H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 493 (1993).

When Congress made this determination, the Commission had expressly proposed allowing PCS to serve as a substitute for traditional local exchange service — a wireless local loop.[7] The Commission had already stated that it hoped PCS services would be used to "replace the last mile to the home with a radio link to reduce servicing and maintenance costs."[8] Thus, the Commission envisioned replacement of the wired link to the home with a radio link. Under this approach, customers would still have their traditional phones and inside wiring — "fixed" service — but the link from the street/network to the home would be wireless, not wired.

By expressly stating that all services provided by holders of personal communications service licenses would always be considered "mobile," Congress made clear that PCS providers offering wireless local loop would be regulated as CMRS *even if the service was fixed in nature*. Unless Congress intended to cover such fixed applications, there was no need to include PCS in the definition of "mobile" — all mobile PCS services would have been covered. By including PCS in the definition, Congress was ensuring that "wireless local loop" applications could develop based on a uniform set of regulations. Congressional intent, however, was not to permanently exclude state regulation of such services. Pursuant to Section 332, a state can engage in rate and entry regulation of such services only when they are "a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State."[9] To

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7 *See Tentative Decision*, 7 F.C.C.R. at 5685, 5689 (noting that PCS would be used to "replace the last mile to the home with a radio link to reducing servicing and maintenance costs."); *see also PCS Second Report*, 8 F.C.C.R. at 7712.

8 *See Tentative Decision*, 7 F.C.C.R. at 5685.

9 47 U.S.C. § 332(c)(3)(ii); *see* H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 493 (1993). *Accord* 47 U.S.C. § 153(26); H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 115 (1996).

determine whether a CMRS service satisfies this test, the Commission should compare the number of access lines served by a LEC upon compliance with the Section 271 competitive checklist,[10] against the number of access lines replaced by the CMRS service. If the wireless service has replaced a substantial number (*i.e.*, more than 30%) of such lines, the Commission would have to determine whether the service should lose its CMRS status and be subject to state rate and entry regulation.

Congress reconfirmed this approach in the Telecommunications Act of 1996 ("1996 Act") by expressly recognizing that CMRS would compete directly with traditional local exchange service. The 1996 Act defines a "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person . . . engaged in the provision of commercial mobile radio service under section 332(c), *except to the extent that the Commission finds that such service should be included in the definition of such term*." 47 U.S.C. § 153(26). Congress explained that CMRS would be covered by the local exchange carrier definition only upon a finding that the service "is a replacement for a substantial portion of the wire[line] telephone exchange service within [a] State."[11] Thus, licensees offering fixed wireless local loop service over CMRS spectrum will be regulated as CMRS providers unless their service is a replacement for a substantial portion of the wireline telephone exchange service within a state.

WWC urges the Commission to regulate wireless local loop services, and other fixed offerings, consistent with Congressional intent. To do this, the Commission should make clear that state rate and entry regulation of fixed CMRS is preempted (i) if such fixed services are offered on

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[10] 47 U.S.C. § 271(c)(2)(B).

[11] H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 115 (1996).

a competitive basis by a number of companies, and (ii) the fixed service does not replace a substantial number of an incumbent LEC's access lines within a state.

II. REGULATORY PARITY REQUIRES THAT FIXED SERVICES OFFERED ON CMRS SPECTRUM BE REGULATED AS CMRS

As the Commission has recognized, "equaliz[ing] the regulatory requirements applicable to all mobile service providers by allowing competing operators to offer the same portfolio of service options and packages . . . is required by Congress' mandate that comparable mobile services receive similar regulatory treatment."[12] In keeping with this Congressional mandate, the Commission has followed a policy of treating similarly situated licensees in the same manner.[13]

The FCC has made clear that it views cellular and PCS as substitutable and that SMR is substantially similar to cellular.[14] Thus, even if Congress did not intend to include cellular within the term "personal communications service," cellular, SMR, and PCS must be subject to the same regulation.[15] Thus, fixed services provided by PCS, cellular, and SMR licensees should be

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12 *Eligibility for the Specialized Mobile Radio Services*, GN Docket No. 94-90, *Report and Order*, 10 F.C.C.R. 6280, 6300 (1995) ("*SMR Eligibility Order*").

13 *See Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1413 (1994) ("*Parity Order*"); *see also Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965); *Public Media Center v. FCC*, 587 F.2d 1322, 1331 (D.C. Cir. 1978); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995).

14 *See PCS Second Report*, 8 F.C.C.R. at 7715, 7725, 7727, 7732-33, 7742-47, 7764 & n.120 (*see also Cincinnati Bell*, 69 F.3d 752, 768 (6th Cir. 1995)); *SMR Eligibility Order*, 10 F.C.C.R. at 6288 ("*SMR Eligibility Order*").

15 Both of these services, including the fixed services provided by such licensees, fall within the broad definition of "personal communications services" adopted in the PCS docket. *See* 47 C.F.R. § 24.5.

regulated as CMRS and exempt from state rate and entry regulation.[16]

Moreover, even if a service does not meet every prong of the CMRS definition, it must be regulated as CMRS if it is the "functional equivalent" of CMRS.[17] One of the principle objectives of the 1993 amendments to the Communications Act was to eliminate disparities in regulation between similar services arising solely because of technical differences between the services. The Commission has stated that if services are substitutable, they are functionally equivalent and must be regulated in the same manner.[18] Under this test, a fixed cellular PBX application is the functional equivalent of the fixed PCS PBX application. Because fixed PCS applications must be regulated as CMRS pursuant to the Communications Act,[19] the fixed cellular service also must be regulated as CMRS.

Similarly, it would undermine regulatory parity principles for the Commission to continue regulating a fixed service provided over CMRS spectrum on an ancillary basis as CMRS, yet regulate the same service differently if the provider does not also offer mobile service. The two services are still the functional equivalent. Specifically, it would be inequitable to allow a 30 MHz

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16 *Accord* Ad Hoc Rural Cellular Coalition Comments, WT Docket No. 96-6, at 5-9 (Mar. 1, 1996); AT&T Comments, WT Docket No. 96-6, at 9-10 (Mar. 1, 1996); BellSouth Corporation Comments, WT Docket No. 96-6, at 3-4 (Mar. 1, 1996); Celpage, Inc. Comments, WT Docket No. 96-6, at 6 (Mar. 1, 1996); GO Communication Corporation Comments, WT Docket No. 96-6, at 5-6 (Mar. 1, 1996); PCIA Comments, WT Docket No. 96-6, at 7-11 (Mar. 1, 1996); Omnipoint Corporation Comments, WT Docket No. 96-6, at 6-7 (Mar. 1, 1996); Sprint Spectrum Comments, WT Docket No. 96-6, at 4-5 (Mar. 1, 1996); U S WEST Comments, WT Docket No. 96-6, at 6-7 (Feb. 26, 1996).

17 47 C.F.R. § 332(d)(3); *Parity Order*, 9 F.C.C.R. at 1428-29.

18 *Parity Order*, 9 F.C.C.R. at 1428-29.

19 As noted above, fixed PCS applications are still considered "mobile" under the Communications Act and, thus, must be regulated as CMRS if they otherwise meet the CMRS definition.

CMRS licensee to offer fixed services over 10 MHz of its spectrum and retain CMRS status for those fixed services, yet the same service offered by a 10 MHz CMRS licensee would be regulated differently because the licensee did not have additional spectrum on which to offer mobile service.[20] It would run counter to the objectives of the 1993 amendments to regulate fixed PCS services as CMRS (as required by Section 332) and to regulate other, substitutable fixed, wireless services in a different manner.

III. THE COMMISSION SHOULD SUBJECT WIRELESS FIXED SERVICE OFFERED OVER CMRS SPECTRUM TO THE SAME TITLE II FORBEARANCE APPLIED TO TRADITIONAL CMRS SERVICE

To the extent fixed wireless services offered over CMRS spectrum are not regulated as CMRS, WWC urges the Commission to forbear from applying Sections 203, 204, 205, 211, 212, and 214 of the Communications Act. Pursuant to Section 332(c)(1)A), the Commission may forbear from these provisions if it determines that:

> (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
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> (ii) enforcement of such provision is not necessary for the protection of consumers; and
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> (iii) specifying such provision is consistent with the public interest.

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[20] This inequity would be magnified if a bidder in the on-going PCS auctions intends to compete solely with the fixed offerings provided by a 30 MHz PCS licensee. Bidders' strategies are based on the FCC's regulatory parity goals; any subsequent action which regulates fixed services offered by 10 MHz and 30 MHz PCS licensees differently may undermine the strategies of 10 MHz bidders and devalue such licenses.

The Commission has previously determined that it can forbear from applying the above-referenced provisions to CMRS under this test. There is no reason to treat fixed services offered over CMRS spectrum differently.

CONCLUSION

For the foregoing reasons, WWC urges the Commission to regulate fixed services provided over CMRS spectrum as CMRS unless the services become a replacement for a substantial portion of traditional wireline local exchange service within a state. States should be permitted to regulate rate and entry of such services only upon a finding that the fixed services have become a substantial substitute for local exchange service.

Respectfully submitted,

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